Local 9, International Union of Bricklayers and Allied Craftsmen, AFL–CIO, f/k/a Central Michigan Administrative District Council *and* Louis W. Walter. Case 7–CA–35423

January 13, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On July 28, 1994, Administrative Law Judge Lowell M. Goerlich issued the attached decision. Counsel for the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order for the reasons set forth below.

The judge found, and we agree, that the General Counsel has failed to establish prima facie that the Respondent selected Louis W. Walter Jr. and Larry Spofford for layoff on July 19, 1993, because of their purportedly adverse testimony to the Respondent in Case 7–CA–33506, involving the Respondent's failure to retain secretary Ursula Schrader.

The General Counsel has excepted to the judge's failure to address and find violations of Section 8(a)(1) and (4) based on certain additional allegations specified in its posthearing brief to the judge that it contends are subsumed within the original complaint, namely, that the Respondent selected Walter and Spofford for layoff in part because of their communications with Schrader while her litigation was pending and their vocal opposition to the Respondent's purported attempts to fabricate evidence to bolster its defense in that proceeding.

We find no merit in these exceptions because we find, from our careful examination of the record, that there is insufficient evidence to establish prima facie any violations based on those additional allegations, even assuming that they are subsumed within the complaint. Accordingly, we adopt the judge's recommendation to dismiss the complaint in its entirety.

[1] The judge incorrectly referred to the underlying Board proceeding in Case 7–CA–33506 as 7–CA–32343; misspelled the names of Ursula ''Schrader,'' Robert E. Van ''Arsdalen,'' and ''Daryl'' Hollenback; and misstated that Hollenback was restored to the ''dictatorship'' instead of ''directorship'' of the district council. These inadvertent errors do not affect our decision.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Joseph P. Canfield, Esq., for the General Counsel.
Christopher P. Legghio, Esq., of Detroit, Michigan, for the Respondent.
Louis W. Walter, Jr., of South Boardman, Michigan, in propria persona.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The charge in this proceeding filed on January 13, 1994, by Louis W. Walter Jr., an individual (the Charging Party), was served by certified mail on Local 9, International Union of Bricklayers and Allied Craftsmen, AFL–CIO f/k/a Central Michigan Administrative District Council (the Respondent), on January 13, 1994. A complaint and notice of hearing was issued on February 14, 1994. The complaint, among other things, alleges that the Respondent permanently laid off the Charging Party and Larry Spofford because they testified at an unfair labor practice hearing before the Board in Case 7–CA–32343, all in violation of Section 8(a)(1) and (4) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer denying that it had engaged in the unfair labor practices alleged.

The complaint came on for hearing at Grand Rapids, Michigan, on May 25 and 26, 1994. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. JURISDICTION

At all material times, the Respondent has maintained its principal office and place of business at 241 East Saginaw Street, Suite 402, East Lansing, Michigan (the East Lansing facility). The Respondent is, and has been at all times material, an unincorporated association engaged in the business of representing employees in bargaining with employers with respect to wages, hours, and other terms and conditions of employment.

At all material times, the Respondent has been chartered as an integral part of a multistate labor organization, the International Union of Bricklayers and Allied Craftsmen, AFL–CIO, which maintains its national headquarters in Washington, D.C.

During the calendar year ending December 31, 1993, which period is representative of its operations during all times material hereto, the Respondent, in the course and conduct of its business operations, collected and received dues and initiation fees in excess of $100,000 and remitted from its East Lansing, Michigan facility to the Washington, D.C. facility of the International Union of Bricklayers and Allied

Craftsmen, AFL–CIO, dues, initiation fees, and per capita taxes in excess of $50,000.

At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES INVOLVED

The parties stipulated that the Respondent was a successor to Central Michigan Administrative District Council (the District Council).[1] The Charging Party, Larry Spofford, and Robert E. Van Arsdaalen, among others, were employed by the District Council as field representatives and were members of its executive committee. Darryl E. Hollenback, director of the District Council, laid off the Charging Party, Spofford, and Arsdaalen on July 19, 1993, because of financial difficulties. These three persons gave testimony under subpoena in the case of International Union of Bricklayers and Allied Craftsman and its Central Michigan Administrative District Council and Ursula Schrader, an individual, Case 7–CA–33506. The case was tried between January 11 and May 13, 1993. The General Counsel claims that the three above-named persons were laid off because of the testimony which each gave in the above-mentioned case.

The General Counsel offered the testimony given by Walter and Van Arsdaalen in Case 7–CA–33506. Spofford's testimony was not offered. In this proceeding, Spofford testified that Hollenback and Christopher P. Legghio, the Union's attorney, had told him that he had done a ''good job'' in presenting testimony in Case 7–CA–33506.

Walter testified that in April 1993, Walter, Spofford, and Van Arsdaalen, along with others of the executive committee, filed internal union charges against Hollenback who had been appointed director of the District Council. Hollenback was summarily removed from office. Walter was ''appointed interim'' director.

Thereafter, Hollenback was restored to the dictatorship and charges against him were dismissed.

In the judge's decision in Case 7–CA–33506 it is stated:

> The Complaint alleges that the Respondents violated Section 8(a)(1) and (3) by . . . the discriminatory failure of Respondent Central Michigan Administrative District Council acting through its agent, Darryl Hollenback, to offer the Charging Party a job at District Council for the continued preference for Teamsters Local 580 rather than Teamsters Local 164, thereby discouraging membership in a labor organization.

In the judge's decision it is also revealed:

> This case turns on the credibility, or lack of it, of three people, Ursula Schinder, the Charging Party; Darryl Hollenback, the Director of the District Council; and Thomas McClanahan, the International Union's Director of Regionalization Projects. There were a number of other witnesses called in this case, whose testimony I find credible, but not dispositive of any of the issues in this case.

Walter testified on both January 29 and March 8, 1993. Spofford testified on January 28, 1993. Walter was laid off around 4 months later. Spofford was laid off around 7 months later.

The work assignments of Walter and Spofford were not discriminatorily changed by Hollenback after they testified. Neither individual was threatened before or after their testimony with reprisals nor were they obstructed from testifying.[2]

CONCLUSIONS AND REASONS THEREFOR

The Respondent asserts that the complaint should be dismissed because the General Counsel has not established a prima facie case. I agree.

Section 8(a)(4) provides: ''It shall be an unfair labor practice for an employer . . . (4) to discharge on otherwise discriminate against an employee because he has filed charges or given testimony under this Act.''

The General Counsel avers that Walter and Spofford were laid off because they gave testimony in Case 7–CA–33506 adverse to the Respondent.

On this subject, the testimony of Spofford was not offered. Adverse testimony of Walter is thus described in the General Counsel's brief. ''Walter testified that he never attended a meeting when the hiring of secretaries was discussed.'' Apparently, the General Counsel considered this testimony to be adverse to the Respondent because the Respondent ''failed to establish that the two secretaries had been hired, or even considered, by the Executive Committee.''

The judge held:

> Since he [Hollenback] was acting on behalf of the District Council in not offering her a job, and he was motivated by union animus in not making the job offer, the District Council as his employer, is responsible for his actions and violated Section 8(a)(1) and (3) of the Act by unlawfully discriminating against Ms. Schroder because she engaged in protected activity.

In view of this finding of the judge it does not appear that Walter's testimony contributed to this finding or had an adverse impact on the Respondent's position. Moreover, the judge viewed the testimony of Walter and others as not ''dispositive'' of any issue.

As to Spofford, the General Counsel concedes that his testimony was not adverse on its face.[3]

I have carefully reviewed the testimony of the Charging Party and Arsdaalen given in the Case 7–CA–33506, the decision of the judge in the case, and the entire record in the instant case and I find no credible evidence which will support a finding that the testimony of Walter, Spofford, and Van Arsdaalen was adverse to the position of the Respondent[4] or that they were selected for layoff because they engaged in activity protected by Section 8(a)(4) of the Act.

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[1] Local 9 has been in place since October 9, 1993.

[2] I have reviewed the entire record as a whole and have not pretermitted any evidence. My findings have been based only on the material evidence.

[3] The General Counsel writes in his brief, ''While the testimony of Spofford was not adverse to Respondent's position on its face, neither did it assist Respondent's case.''

[4] In his brief, ''the selection of Walter, Spofford and Van Arsdaalen for layoff is highly suspicious.'' Although this may be, the evidence to be dispositive must be more than a suspicion.

I find, having weighed all the material evidence most favorable for the General Counsel, that the General Counsel has not established a prima facie case[5] because the testimony in Case 7–CA–33506 cannot be reasonably construed to have been adverse to the position of the Respondent; the time lag between the time of the testimony and the action taken was such as to rebut a claim of discrimination; the failure of the Respondent to take any claimed reprisals against the testifiers for an extended period of time after their testimony rebuts the claim of discrimination.

Further, the Respondent made no threats of reprisal against the testifiers either before or after they testified, nor did it obstruct in any manner their testifying; no credible discriminatory motive was proved; Spofford was complimented for his testimony; and there is no credible evidence that the Respondent was dissatisfied with the testimony given by the alleged discriminatees in Case 7–CA–33506.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

[5] See *Wright Line*, 251 NLRB 1083 (1980).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.